United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
John R. Hughes, Jr.

Docket No.

77-1235
77-1236

Brs

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

EDWARD COLLINS and MICHAEL PETERS

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

GEORGE W.F. COOK
United States Attorney

JOHN R. HUGHES, JR.
JEROME J. NIEDERMEIER
Assistant U.S. Attorneys
District of Vermont

TABLE OF CONTENTS

Page

TABLE OF CASES i

STATEMENT OF THE CASE 1

STATEMENT OF ISSUES 4

STATEMENT OF FACTS 5

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY. 10

POINT II

THE COURT PROPERLY ALLOWED CROSS-EXAMINATION OF COLLINS CONCERNING A PREVIOUS ARREST. 15

POINT III

THE COURT PROPERLY EXCLUDED THE HEARSAY TESTIMONY OF COLLINS. 19

POINT IV

THE COURT CORRECTLY INSTRUCTED THE JURY ON ACCOMPLICE TESTIMONY. 21

CONCLUSION 25

TABLE OF CASES

Page

Curley v. United States, 160 F.2d 229, (D.C. Cir. 1947), cert. denied, 331 U.S. 837, reh. denied, 331 U.S. 869 10

Nye & Nissen v. United States, 336 U.S. 613 (1949) . . . 13

Wyatt v. United States, 388 F.2d 395 (10th Cir. 1968). . 14

United States v. Araujo, 539 F.2d 287 (2d Cir. 1976) . . 18

United States v. Augello, 452 F.2d 1135 (2d Cir. 1971), cert. denied, 406 U.S. 922 (1972) 23

United States v. Baumgarten, 517 F.2d 1020 (8th Cir. 1975), cert. denied, 423 U.S. 878 14

United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976) 23

United States v. Blackwood, 456 F.2d 526 (2d Cir.), cert. denied, 409 U.S. 863 (1972) 20

United States v. Campbell, 426 F.2d 547 (2d Cir. 1970) . 20

United States v. Cheung, et al, ___ F.2d ___ (Doc. No. 76-1362, 1369)(2d Cir. Feb. 28, 1977) 23

United States v. Corallo, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969) 23

United States v. Curry, 471 F.2d 419 (5th Cir. 1973), cert. denied, sub nom United States v. Cirado, 411 U.S. 967 (1973) 23

United States v. Daniels, ___ F.2d ___ (No. 77-1071) (2d Cir. 1977) 23

United States v. Dickerson, 508 F.2d 1216 (2d Cir. 1975) 13

United States v. Evanchik, 413 F.2d 950 (2d Cir. 1969) . 16

United States v. Falange, 426 F.2d 938 (2d Cir. 1970), cert. denied, 400 U.S. 906 24

United States v. Harris, 441 F.2d 1333 (10th Cir. 1971) 14

United States v. Harvey, 526 F.2d 529 (2d Cir.), cert. denied, 424 U.S. 956 (1975) 17, 18

United States v. Kahn, 472 F.2d 272 (2d Cir. 1973). . . . 16

United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971) . . 17

United States v. Licursi, 525 F.2d 1164 (2d Cir. 1975). . 13

United States v. Manna, 353 F.2d 191 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966), reh. denied, 385 U.S. 893 . . . . . 13, 14

United States v. Marks, 368 F.2d 566 (2d Cir. 1966) . . . 23

United States v. Mattio, 388 F.2d 368 ( ), cert. denied, 290 U.S. 1043 23

United States v. Papadakis, 510 F.2d 287 (2d Cir.), cert. denied, 44 U.S. 958 (1975) 17, 18

United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). . . 13, 14

United States v. Taylor, 464 F.2d 240 (2d Cir. 1972) . . 10

United States v. Terrell, 474 F.2d 872 (2d Cir. 1973). . 13

United States v. Tyminski, 418 F.2d 1060 (2d Cir. 1969), cert. denied, 392 U.S. 1075 (1970) 23

United States v. Wiebold, 507 F.2d 932 (8th Cir. 1974). 13

Rules

Rule 403, F.R.E. 18

Rule 611(b), F.R.E. 16

Statutes

18 U.S.C. § 2 2

18 U.S.C. § 371 3

18 U.S.C. § 2312 2

18 U.S.C. § 2313 2

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

EDWARD COLLINS and
MICHAEL PETERS

Appellants

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Michael Peters and Edward Collins appeal from a judgments of conviction entered on April 27, 1977 after a four-day trial before the Honorable James S. Holden, Chief, United States District Judge, and a jury.

An indictment (DA 6-13)*, bearing criminal number 76-76 and filed on September 30, 1976, was superseded by an indictment filed on December 16, 1976 bearing criminal

---

* DA refers to Defendants' Joint Appendix; other references are as follows: Tr. - Trial Transcript; DCB - Defendant Collins' Brief; DPB - Defendant Peters' Brief; GX - Government's Exhibit; Doc. - Document No.

number 76-76(s) and charging George Fitch, David Kotlorowski, Edward Collins and Michael Jean Peters in six counts as follows:

Count I charged defendants Fitch, Collins and Peters with the transportation in interstate commerce of a stolen 1963 Cadillac. (18 U.S.C. §§ 2, 2312)

Count II charged defendant Kotlorowski with the transportation in interstate commerce of a stolen 1958 Cadillac. (18 U.S.C. §§ 2, 2312)

Count III charged defendants Fitch and Peters with the transportation in interstate commerce of a stolen 1967 Austin Healy. (18 U.S.C. §§ 2, 2312)

Count IV charged defendant Collins with receiving, concealing, storing, bartering, selling and disposing of a stolen 1967 Austin Healy which was part of and constituted interstate commerce. (18 U.S.C. § 2313)

Count V charged defendants Fitch, Collins and Peters with the transportation in interstate commerce of a stolen 1966 Austin Healy. (18 U.S.C. §§ 2, 2312)

Count VI charged all defendants with conspiracy to commit the crimes charged in Counts I-V and listed four

overt acts committed in furtherance of the conspiracy. (18 U.S.C. § 371)

The trial of defendants Collins and Peters* commenced on February 23, 1977 and on March 1, 1977 the jurors returned verdicts of guilty on all counts. (Tr. 569-70)

On April 27, 1977 Judge Holden sentenced Edward Collins to the custody of the Attorney General for a period of one year on Counts I, IV, V and VI, the sentence on each Count to run concurrently. (DA. 49) On the same date Judge Holden also sentenced Michael Peters to the custody of the Attorney General for a period of one year in Counts I, III, V and VI, the sentence on each Count to run concurrently. (DA.48) Execution of the sentences was stayed pending appeal.

---

* George Fitch entered a plea of guilty to Count I of the indictment on December 28, 1976 and the remaining counts against him were dismissed at the time of sentencing on March 2, 1977. (DA. 2; Doc. 25) David Kotlorowski entered a plea of guilty to Count II of the indictment on February 7, 1977 and Count VI of the indictment was dismissed at the time of sentencing on March 18, 1977. (DA. 3; Doc. 38)

STATEMENT OF ISSUES

I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

II. WHETHER THE COURT PROPERLY PERMITTED THE GOVERNMENT TO CROSS-EXAMINE DEFENDANT COLLINS ON A PREVIOUS ARREST WHICH HAD BEEN RAISED BY HIM AND LEFT IN A CONFUSING AND MISLEADING STATE BY DEFENSE COUNSEL.

III. WHETHER THE COURT PROPERLY EXCLUDED TESTIMONY BY COLLINS AS TO THE TRUTH OF OUT-OF-COURT STATEMENTS MADE BY A WITNESS OUTSIDE OF COLLINS PRESENCE.

IV. WHETHER THE COURT'S INSTRUCTION ON ACCOMPLICE TESTIMONY CORRECTLY STATED THE LAW AND FACTS.

STATEMENT OF FACTS

In the light most favorable to the Government the jury could have found the following facts:

In 1972 or 1973 George Fitch first met defendants Edward F. Collins, Jr., and Michael Jean Peters in the Brookline, Massachusetts area. Fitch became more friendly with them in 1973 or 1974. Then during the summer of 1975, Fitch met with Collins and Peters almost daily. (Tr. 106-09, 118, 153, 275, 301, 451)

On July 23 or 24, 1975 a 1963 Cadillac, vehicle identification number 63R101815,* and owned by Sidney Ives, was stolen in Cambridge, Massachusetts. (Tr. 76, 80, 111; GX 1-3) George Fitch paid two individuals fifty dollars ($50) to steal the car for him. (Tr. 109-111; GX 2, 3) At the time it was stolen the car had a replacement value of forty-five hundred dollars ($4500). (Tr. 80)

Fitch later told Collins and Peters that the 1963 Cadillac was stolen. (Tr. 112) Fitch left the Cadillac

---

* This car is the subject of Count I of the indictment.

on a Boston street (Tr. 111) while he, Peters and Collins moved to Vermont. (Tr. 119-121) Fitch registered the Cadillac in Vermont in early August 1975. (Tr. 123) Then in the middle of August 1975 Fitch, Collins and Peters returned to Boston to pick up the stolen Cadillac. (Tr. 123-4) Collins and Peters, both of whom knew the Cadillac was stolen (Tr. 124), drove Fitch to Boston so Fitch could transport the Cadillac back to Vermont (Tr. 124-5). Fitch put Vermont plates on the Cadillac and then followed Collins and Peters back to Vermont since Fitch was unfamiliar with the route. (Tr. 125-6) On September 25, 1975 Police Chief Richard Pratt observed the Cadillac parked in Wilmington, Vermont. (Tr. 242-3) Both Collins and Fitch appeared and told Pratt that they had borrowed the car. (Tr. 246) In the presence of Collins, Fitch gave an alias to Chief Pratt (Id.). Pratt determined the car was in excellent condition and had been stolen from Sidney Ives. (Tr. 246, 248)

On July 29, 1975, George Fitch stole a green 1966 Austin Healy, vehicle identification number HBJ8L36255*, from in front of the home of owner Robert Leslie in Boston. (Tr. 81-83, 114, 128-9, 283-5, 287; GX 4) To break into the car Fitch used a butter knife he had obtained from Collins and Peters at their apartment. (Tr. 114) Fitch told them that he

---

* This car is the subject of Count V of the indictment.

needed a screw driver to break into the car. (Id.) Collins and Peters had no screw driver but gave Fitch the butter knife. (Tr. 114-5) Peters offered to serve as lookout while Fitch stole the car. (Tr. 115) Peters did so. (Id.) Fitch put the Austin Healy into a Boston garage (Tr. 116) before he moved to Vermont with Peters and Collins in August of 1975. (Tr. 119-22)

Two weeks later, Collins and Peters drove Fitch to Boston with the express purpose of helping Fitch pick up the 1966 Austin Healy, which they knew he had stolen previously. (Tr. 114-5, 127) After Collins, Peters and Fitch conducted some business in Boston, Collins and Peters led Fitch, who was driving the stolen Austin Healy, back to Vermont since Fitch was not sure of the route. (Tr. 128) Fitch later traded this Austin Healy to John Meruso (sic) for a motorcycle. (Tr. 128) The car was later recovered from Meruso (sic) and identified as Leslie's. (Tr. 284-5, 287-8) Leslie testified that the insurance value of the car was three thousand dollars ($3000). (Tr. 85)

In September 1975 Collins offered to pay Fitch three hundred dollars ($300) if Fitch would steal a specific 1967 black Austin Healy that Collins had seen in the Boston area. (Tr. 129-31, 135) Peters and Fitch agreed to steal this car and split the money. (Tr. 131)

Between September 9-10, 1975, a 1967 black Austin Healy, vehicle identification number HBJ8640958*, was stolen in Boston from Mr. and Mrs. Francis Tavares. (Tr. 86-87, 95; GX 5-7) The car was in excellent condition with a replacement value of three thousand dollars ($3,000). (Tr. 97) On September 19, 1975, Peters drove Fitch to Boston, helped him locate the Tavares' car, acted as lookout while Fitch stole the car, helped Fitch push the car down the alley, led Fitch back to Vermont, and split with Fitch the $50 paid by Collins upon delivery of the car that same afternoon. (Tr. 95, 129-33, 135-6) Fitch and Collins made out a fictitious bill of sale for this Austin Healy showing a sale from one Peter Gansett to Collins for $180. (Tr. 135-7; GX 18) Collins registered this car in Vermont. (Tr. 139; GX 21, 22)

During an interview on October 6, 1975, Collins admitted to Chief of Police Pratt that he had bought the 1967 Austin Healy from George Fitch, that he had ordered the car from

---

* This car is the subject of Counts III and IV of the indictment.

George Fitch after he had seen another Austin Healy in the yard at his residence and that Collins knew the car was stolen at the time the bill of sale was made out. (Tr. 242, 253, 257-8) Collins admitted that the purchase price was $300 but he changed the amount to $180 in the bill of sale so he could afford to pay the sales tax. (Tr. 137, 258, 270-1) Collins told Pratt that after Pratt stopped him and Fitch, on September 25, 1975, he took the 1967 Austin Healy back to Boston and left it abandoned on a side street. (Tr. 252, 259, 271)

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY

The standard in this Circuit for determining whether to permit a case to be decided by the jury was set forth in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947), cert. denied, 331 U.S. 837, reh. denied, 331 U.S. 869.

> The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

The Court in Taylor clearly focused on the fact-finding function of the jury:

> . . .But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.

Taylor at 243, quoting Curley at 232.

Collins and Peters now contend that the Government's evidence was insufficient as a matter of law and therefore the trial court erred in allowing the case to go to the jury.

Collins and Peters were charged in Count I of the indictment with aiding and abetting the interstate transportation of a stolen 1963 Cadillac, knowing it to be stolen. George Fitch testified that he paid $50 to have this 1963 Cadillac stolen for him, (Tr. 110-111) and later told Collins and Peters that this car was stolen. (Tr. 112) When Fitch, Collins and Peters moved to Vermont, Fitch left the Cadillac in Boston. (Tr. 111, 119-21) Fitch then registered the Cadillac in Vermont. (Tr. 112, 123) In August, 1975, Collins and Peters, who both knew that the Cadillac was stolen (Tr. 124), drove Fitch to Boston in order that he could pick up the Cadillac. (Tr. 124-25) Collins and Peters led Fitch back to Vermont since he was unfamiliar with the route. (Tr. 125-26) Collins clearly showed guilty knowledge of the theft by telling Chief Pratt that the car was borrowed, going along with Fitch's use of an alias (Tr. 246), and "dumping" the stolen 1967 Austin Healy in Boston right after he became aware that Pratt was investigating the stolen 1963 Cadillac. (Tr. 259)

Count IV of the indictment charged Collins with receiving a stolen 1967 Austin Healy which had moved in interstate commerce and Count III charged defendant Peters with aiding and abetting the transportation of this same vehicle in interstate commerce, knowing it to be stolen. Fitch testified that after Collins and Peters helped him transport the 1966 Austin Healy, Collins offered to pay Fitch three hundred dollars ($300) if Fitch would steal a specific 1967 black Austin Healy that Collins had seen in the Boston area. (Tr. 129-31, 135) Peters and Fitch agreed to steal this car together and split the money. (Tr. 131) Peters drove Fitch to Boston, helped him locate the car, acted as a lookout while Fitch stole the car, helped Fitch push the car down the alley, led Fitch back to Vermont and split with Fitch the $50 paid by Collins upon delivery of the car. (Tr. 95, 129-33, 135-36) Fitch and Collins made out a fictitious bill of sale for this Austin Healy and Collins registered this car in Vermont. (Tr. 135-7, 139; GX 18, 21, 22)

Count V of the indictment charged Collins and Peters with aiding and abetting the interstate transportation of a stolen 1966 Austin Healy, knowing it to be stolen. Fitch testified that in July 1975, he decided to steal this Austin Healy and told Collins and Peters that he needed a screw driver to break into the car. (Tr. 114) Collins and Peters

had no screw driver but gave Fitch a butter knife. (Id.) Peters offered to serve, and did serve, as a lookout while Fitch stole the car. (Tr. 115) After Collins, Fitch and Peters moved to Vermont, Collins and Peters again drove Fitch to Boston for the express purpose of aiding Fitch in the transportation of the Austin Healy to Vermont. (Tr. 114-5, 12-8) Both Collins and Peters knew that this car had been stolen by Fitch. (Id.)

In Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), the Supreme Court, quoting from Judge Learned Hand in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), defined the elements of aiding and abetting:

> In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his own action to make it succeed.'"

See also United States v. Licursi, 525 F.2d 1164, 1167 (2d Cir. 1975); United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1973); United States v. Manna, 353 F.2d 191, 192 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966), reh. denied, 385 U.S. 893. An aider and abettor must consciously assist the commission of the specific crime in some affirmative or active way. United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975); United States v. Wiebold, 507 F.2d 932, 934 (8th Cir. 1974). See also

United States v. Baumgarten, 517 F.2d 1020, 1027 (8th Cir. 1975), cert. denied, 423 U.S. 878; United States v. Harris, 441 F.2d 1333, 1336 (10th Cir. 1971).

Collins and Peters provided a tool for Fitch to break into the 1966 Austin Healy (Tr. 114); they drove him from Vermont to Massachusetts so Fitch could drive the stolen Cadillac and 1966 Austin Healy back to Vermont (Tr. 114-5, 124-5, 127) and they showed him the route (Tr. 125-6, 128); Peters drove Fitch to Boston so he could steal the 1967 Austin Healy (Tr. 131) and helped him steal it (Tr. 132); Peters split the money paid by Collins with Fitch (Tr. 135); and Collins ordered and received the stolen 1967 Austin Healy. (Tr. 130, 135) Collins' and Peters' conduct clearly constitutes actions and participation to make the ventures succeed, not mere innocent association. United States v. Peoni, supra; United States v. Manna, 353 F.2d 191 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966); reh. denied, 385 U.S. 893; Wyatt v. United States, 388 F.2d 395 (10th Cir. 1968).

The evidence stated above also was sufficient to find that Collins and Peters were members of a conspiracy. Their actions with Fitch were clearly probative of an agreement to transport and receive stolen cars.

II.

THE COURT PROPERLY ALLOWED CROSS-EXAMINATION OF COLLINS CONCERNING A PREVIOUS ARREST.

On direct examination Collins testified that when he returned to Vermont on October 4, 1975, after a four-day absence, Michael Peters told him that he had been arrested by the police in relation to stolen cars (Tr. 326-7) and that the police were looking for Collins on the same charge. (Tr. 327)

Collins also stated on direct that he was interviewed by Chief Pratt on October 6, 1975 about stolen cars. (Tr. 328) At the end of his direct examination he again repeated that Peters had been arrested about the stolen cars. (Tr. 330) On cross-examination by the Government Collins admitted that, prior to Collins' interview with Chief Pratt, Peters had told him that the police wanted to talk to Collins about the stolen cars (Tr. 370, 376, 378) and that Peters had already been arrested for that charge. (Tr. 375)

However, on recross examination by Peters' counsel Collins abruptly changed his testimony and stated that the arrest of himself and Peters really had no relation to stolen cars (Tr. 384) and, in fact, the unrelated charges which caused the arrest of Collins and Peters had been dismissed. (Id.) At this point the testimony before the jury concerning the cause of the arrest of Collins and Peters in October 1975 which was raised by Collins himself

and the subsequent dismissal of the charges was ambiguous and misleading.

On recross by the Government, Collins again corrected his earlier testimony and said that he did not know that the police wanted to question him about stolen cars (Tr. 392-3). He also stated that Pratt asked him questions about the house. (Id.)

The Government was permitted at this point, over defendants' objections, to inquire into the nature of the charges which had been dismissed. Defendants contend that this was error.

It is well-settled that the scope of cross-examination is within the sound discretion of the trial judge, United States v. Kahn, 472 F.2d 272, 281 (2d Cir. 1973) and cases cited therein; Rule 611(b); United States v. Branchik, 413 F.2d 950 (2d Cir. 1969). In this case the first mention that the arrest spoken of by Collins was not related to stolen cars was elicited from Collins on recross by Peters' counsel. Collins went on to say that the charges which were the subject of that arrest were dismissed. Previously Collins had stated that the arrest did involve stolen cars. Since there was no mention of any other arrest other than the one in October 1975, a misleading impression was left in the jury's mind that the charges which were dismissed concerned in some way stolen cars and related to the subject matter of the present indictment. It was

clearly proper for the court to allow inquiry into this area since the fact of the previous arrest and charges had been first inquired into by the defense and had been left in a misleading state.

This Circuit has held that "[E]vidence of other crimes is admissible if relevant except when offered solely to prove criminal character." United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), cert. denied, 44 U.S. 958 (1975); United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971). The evidence of the charges regarding the stolen property found in the defendants' house was introduced solely to correct a misleading impression created by the defendants and was admissible for that purpose. United States v. Harvey, 526 F.2d 529 (2d Cir.), cert. denied, 424 U.S. 956 (1975). In Harvey, after the defense had created a false impression on direct examination that a witness was involved in a scheme to have Harvey unjustly arrested on the indictment, the Government was allowed on cross-examination of that witness to correct that impression by eliciting testimony about the witness' cooperation in the arrest of Harvey on an earlier unrelated charge. This Court affirmed stating:

> Because the testimony was introduced for a proper purpose, the fact that it also tended to show that the defendant had a criminal character does not render it inadmissible.

526 F.2d at 536.

The testimony elicited from Collins was introduced for the same proper purpose as in Harvey, i.e. to correct a misleading impression. The fact that it may have indicated prior criminal conduct* did not render it inadmissible since it was relevant for other reasons.** United States v. Harvey, supra; United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), cert. denied, 421 U.S. 950 (1975).

---

* Any prejudice from such conduct was minimal since it was determined at the conclusion of Collins' entire testimony that these charges had been dismissed.

** As Collins admits (DCB 11), under Rule 403, F.R.E., the trial judge has broad discretion to permit or exclude relevant testimony. Cf. United States v. Araujo, 539 F.2d 287, 290 (2d Cir. 1976).

III.

THE COURT PROPERLY EXCLUDED THE HEARSAY TESTIMONY OF COLLINS.

On recross examination of Collins by Peters' counsel Collins was asked:

> And do you have information, Mr. Collins, that a basis for that arrest* was some false information given by Mr. Fitch?

(Tr. 385)

The court sustained the Government's objection that the question called for hearsay (Id.). After Collins stated that he had heard Fitch testify earlier at trial that upon a recent arrest Fitch had lied to the police so that he would be released, Collins was asked:

> Did those lies of your own knowledge, relate to the arrests that were effected upon you and Mr. Peters on charges that were dismissed because they were. . .(Id.)

The Court again sustained a hearsay objection by the Government. (Id.) Peters now claims that the court committed reversible error in its ruling. (DPB 27)

Peters' counsel was clearly referring to his previous cross-examination of Fitch in which Fitch stated that he had lied to police in 1976 about stolen goods so that the police would release him. (Tr. 155-6, 161-2) Specifically, Fitch admitted lying to Chief Pratt about Collins' and Peters' lack of involvement in stolen goods. (Tr. 155-6) The question posed to Collins called for a statement as to

---

* Apparently referring to the arrest by Chief Pratt.

the truth of whatever information was given by Fitch to Pratt or other police officers. The question demanded a hearsay response concerning the truth of statements made by Fitch to police. Any such statements were made by Fitch to the police out of the presence of Collins. Any testimony other than by the declarant (Fitch) or arguably by the police officers in question constitutes classic hearsay. As Peters concedes, (DPB 26-27) Fitch, who had already been cross-examined by Peters' counsel, was available for recall*. The truth or lack thereof of such statements could have been ascertained by recalling Fitch, Pratt or other police officers, not by attempting to elicit hearsay. The exclusion of such testimony concerning Collins' belief that Fitch had lied was not prejudicial. Such evidence was already before the jury from Fitch's own testimony. (Tr. 154-63) The jury clearly was "in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of [Fitch's] motive or bias." United States v. Campbell, 426 F.2d 547, 549 (2d Cir. 1970); accord, United States v. Blackwood, 456 F.2d 526, 529 (2d Cir.), cert. denied, 409 U.S. 863 (1972). Such hearsay testimony of Collins was properly excluded.

---

* Such examination of Fitch may well have been cumulative since Peters' counsel had already cross-examined Fitch on his statements to Pratt and other police officers. (Tr. 154-63)

IV.

THE COURT CORRECTLY INSTRUCTED THE JURY ON THE TESTIMONY OF AN ACCOMPLICE.

George Fitch, a convicted felon, who was admittedly an accomplice of Collins and Peters and an informer, testified at trial for the Government. In his instructions to the jury Judge Holden carefully and thoroughly explained the way in which the jury should consider Fitch's testimony:

> In this case you have heard the testimony of George Fitch, a Government witness who, according to the theory of the Government's case, and as plainly appears in the evidence, was an accomplice.
>
> The Government must frequently resort to the testimony of an accomplice or an informer who participated in a criminal offense, otherwise, it might be difficult if not impossible, to detect and prosecute wrongdoers.
>
> An accomplice is one who unites with another person in the commission of a crime voluntarily and with a common intent.
>
> An accomplice does not become incompetent as a witness because of his participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty even though it is not corroborated in every detail by, or supported by other evidence.
>
> However, the jury should keep in mind that such testimony is always to be received with caution and considered with care and you should never convict the defendant on the unsupported testimony of an alleged accomplice, unless you believe that the unsupported testimony is true and that, beyond a reasonable doubt.
>
> Mr. Fitch also stands in the position of an informer who was called by the Government. And in this regard I caution you that the testimony of a person who is in Mr. Fitch's position, who provides evidence against a defendant for

for purposes of mitigation of his own punishment or for personal advantage or for vindication in any way, must be examined with care, as I have indicated, and with greater care than the testimony of an ordinary witness who is not in that posture.

So it is for you the jury to determine whether the informer's testimony has been affected by interest or prejudice against the defendants. And if so, whether or not that colored his testimony, and, this is a matter that you must consider from all of the evidence.

Now, the fact that the witness Fitch has been convicted of other crimes in Massachusetts, as indicated in the record, may be considered by you only for the purpose of determining the credibility of the witness Fitch.

The fact of such a conviction does not necessarily impair the witness' credibility, it is however, one of the circumstances that you may take into consideration in weigning the testimony of that witness.

Bearing on the credibility of Mr. Fitch's testimony, the Defendant Collins has called a witness, that is Mr. Rockwell, a probation officer who had supervision over Mr. Fitch at some time, concerning the reputation of George Fitch in the Brattleboro community, as to his truthfulness or untruthfulness.

Now a witness may also be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides or where he has recently resided.

If you believe the witness has been impeached, in this regard and discredited, it is your exclusive province to give the testimony of the witness Fitch, such credibility if any, you think it is entitled to deserve in the light of all the circumstances that have been presented as bearing on that point during the course of the trial.

Collins and Peters now contend that such lengthy instructions were somehow inadequate. Such contentions are groundless.

Judge Holden instructed the jury, inter alia, that the testimony of Fitch "should be received with caution and considered with care." United States v. Bermudez, 526 F.2d 89, 99 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Mattio, 388 F.2d 368 cert. denied, 290 U.S. 1043; United States v. Marks, 368 F.2d 566 (2d Cir. 1966). See United States v. Daniels, ___ F.2d ___ Doc. No. 77-1071 (2d Cir. June 30, 1977). He also instructed the jury that the uncorroborated testimony of Fitch if believed beyond a reasonable doubt would be sufficient to sustain a verdict of guilty. United States v. Augello, 452 F.2d 1135, 1140 (2d Cir. 1971), cert. denied, 406 U.S. 922 (1972); accord, United States v. Tyminski, 418 F.2d 1060, 1061 (2d Cir. 1969), cert. denied, 392 U.S. 1075 (1970). Judge Holden also stated:

> . . .the Government must frequently resort to the testimony of an accomplice. . . otherwise it might be difficult if not impossible, to detect and prosecute wrongdoers.

United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), cert. denied, 396 U.S. 958 (1969); United States v. Curry, 471 F.2d 419, 422 (5th Cir.) cert. denied, sub nom United States v. Cirado, 411 U.S. 967 (1973). See also United States v. Cheung, et al, ___ F.2d ___ Doc. Nos. 76-1362, 1369 (2d Cir. Feb. 28, 1977). The court

clearly instructed the jury that George Fitch was an accomplice, informer and convicted felon and that his testimony should be considered carefully. The instructions properly stated the law and more than adequately included the substance of Peters' requests to charge. United States v. Falange, 426 F.2d 938, 933 (2d Cir.), cert. denied, 400 U.S. 906 (1970).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE W.F. COOK
United States Attorney for
The District of Vermont
Attorney for the United
States of America

JOHN R. HUGHES, JR.
JEROME J. NIEDERMEIER
Assistant U.S. Attorneys

August 1, 1977

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	Docket Nos. 77-1235 and 77-1236
	)	
EDWARD COLLINS and MICHAEL JEAN PETERS	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of August, 1977, mailed two(2) copies of the attached Brief to E. Bruce Weber, Esq., Weber, Fisher, Perra & Gibson, 139 Main Street, P. O. Box 558, Brattleboro, Vermont 05301, attorney for Appellant Michael Jean Peters and to Lawrin P. Crispe, Esq., 114 Main Street, Brattleboro, Vermont 05301, attorney for Appellant Edward Collins, postage prepaid.

Jerome J Niedermeier

JEROME J. NIEDERMEIER
Assistant United States Attorney